4

FILED
APR 26 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 737

NICK CHOURNOS, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

---

Milton A. Oman
Salt Lake City, Utah

Milton V. Backman
of Backman, Backman & Clark
Salt Lake City, Utah

Shirley P. Jones
Salt Lake City, Utah
Attorneys for Petitioner

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes and Regulations Involved	2
Explanatory Statement	7
Statement	7
Reasons for Granting the Writ	13
I (a) The Court below has decided an important Federal question which has not been but should be settled by this Court	14
(b) The decision below is in conflict with applicable decisions of this Court	16
II The decision below is in conflict with applicable decisions of other Federal Courts	24
III The decision below is in conflict with Utah Law	28
Conclusion	30

TABLE OF CASES CITED

Page

Costley v. U. S. (1950 CA. 5, Tex.) 181 F2d 723..... 27

Dishman v. U. S. (1950 DC Md.) 93 F. Supp. 567.... 27

Feres v. U. S. (1950 Term U. S. Supreme Court advance Opinions, Vol. 95—No. 3 at page 136)..... 21

Griggs v. U. S. (1949 CA 10, Colo.) 178 F2d 1..... 27

Hall v. Bartholomew (Utah) 51 U. 279, 169 Pac. 943.... 29

Hambleton v. U. S. (1949 DC, Wash.) 87 F. Supp. 994 27

Jones v. Blythe (Utah) 33 U. 362, 93 Pac. 994..... 29

Kendrick v. U. S. (Ala.) 82 F. Supp. 779..... 28

Lazarus v. Phelps 152 U. S. 81..... 22

Light v. U. S. 220 U. S. 523..... 22

Mower v. Olson (Utah) 49 U. 373, 164 Pac. 482..... 29

Oman v. U. S. (CA 10, Utah) 179 F2d 738..... 26

Red Canyon Sheep Co. v. Ickes (CA DC) 98 F2d 308 24

Roe v. Lundstrom (Utah) 89 U. 520, 57 P2d 1128.... 30

Ure v. U. S. (DC Or.) 93 F. Supp. 779..... 26

U. S. v. Richmond Mining Co., 40 Fed. 415..... 17

U. S. United Verde Copper Co. 196 U. S. 207..... 13-17

Winters v. Turner (Utah) 278 Pac. 816..... 29

SUPREME COURT
of the
UNITED STATES
APRIL TERM, 1952
No.....

NICK CHOURNOS, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Tenth Circuit, entered on December 20, 1951, (R. 417-18), petition for rehearing denied February 1, 1952 (R. 419), affirming the judgment of the District Court of the United States for the District of Utah (R. 23-24).

OPINIONS BELOW

The District Court did not write an opinion. Its findings of fact and conclusions of law appear in the record at pages 15-23. The opinion of the Circuit Court of Appeals appears in the record at pages 413-417 .

JURISDICTION

The District Court entered its judgment of no cause of action on February 8, 1951 (R. 23). Notice of appeal from that decision to the Circuit Court of Appeals was filed April 9, 1951 (R. 25-26). The jurisdiction of the district court was invoked under the Federal Tort Claims Act, 28 U. S. C. sec. 1346 (b). Jurisdiction of the Court of Appeals rests upon 28 U. S. C. 1291. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Government (respondent herein) was properly exercising its discretion, under the Taylor Grazing Act, so as to bring it within Sec. 2680 (a) of the Federal Tort Claims Act, in refusing to grant to petitioner the use of any forage from public domain lands which are so intermingled with and surrounded by petitioner's lands that it is physically impossible for him to graze his 62% of the land area without continually grazing the Government's 38% of the land; and in granting permits for the total quantity of public domain forage in the area to other livestock operators who own no lands therein, and who are physically unable to graze any forage from the land area without grazing petitioner's lands.

2. Whether the Government is liable in damages to petitioner for having placed livestock of other operators in the land area concerned, under permits it issued to these others covering periods of time during which no arrangements had been made for the use of petitioner's lands, and knowing that any grazing use of the area would involve a use of petitioner's lands.

3. Whether the Government is liable in damages to petitioner for failing, at the end of the proper grazing season, to remove the livestock of the other operators from the land area concerned, which it had placed in the area under the permits it had issued, and for allowing these livestock to continue to graze the lands out of season.

STATUTES AND REGULATIONS INVOLVED

1. This is an action brought by petitioner against the Government under the provisions of the Federal Tort

Claims Act, pertinent provisions of which, as they appear in Title 28, United States Code (1946 ed., Supp IV), are as follows:

> Sec. 1346(b). Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil action on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> Sec. 2680. The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government whether or not the discretion involved be abused.

2. Pamphlets published by the Department of the Interior and containing in their entirety the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U. S. C. sec. 315, et seq., and the Federal Range Code for Grazing Districts, 43 C. F. R., Part 161, a set of regulations promulgated by the Secretary of the Interior under the authority of the Taylor Grazing Act, are being filed with the Clerk for use by the Court. Most pertinent provisions of the Talyor Grazing Act are as follows:

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That in order to promote the highest use of the public land *pending its final disposal*, the Secretary of the Interior is authorized in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of one hundred and forty-two million acres of vacant, unappropriated, and unreserved lands—."
(Italics supplied.)

"SEC. 3. That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time—. Grazing permits shall be issued only to citizens of the United States . . . *Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them,* * * * (Italics supplied.)

The following two sections of the Taylor Grazing Act are quoted to demonstrate the consistency with which the Congress wrote in provisions to grant to adjacent land owners a preference for not only the use of the public domain forage, but in acquiring title to the public domain like preference is also given.

"SEC. 14. That section 2455 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 2455. Notwithstanding the provision of section 2357 of the Revised Statutes (U. S. C., title 43, sec. 678) and of the Act of August 30, 1890 (26 Stat. 391), *it shall be lawful for the Secretary of the Interior to order into market and sell at public auction,* at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land office of the district in which such land may be situated: PROVIDED, *That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price,* and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants, *but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price*: PROVIDED FURTHER, That any legal subdivisions of the public land, not exceeding seven hundred and sixty acres, the greater part of which is mountainous or too rough for cultivation, may, in the discretion of the said Secretary, be ordered into the market and sold pursuant to this section, *upon the application of any person who owns land or holds a valid entry of lands adjoining such tract,* regardless of the fact that such tract may not be isolated or disconnected within the meaning of this section:—." (Italics supplied.)

"SEC. 15. The Secretary of the Interior is further authorized in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are so situated, as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands for grazing purposes, upon such terms and conditions as the

Secretary may prescribe: PROVIDED, *That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract,* during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary." (Italics supplied.)

Pertinent portions of the Federal Range Code, a set of rules promulgated by the Secretary of the Interior, are as follows:

"161.4 *Classification of base properties.* For the purpose of determining the proper use of the base properties of all applicants and their relative dependence upon the Federal range, land and water conditions and other factors affecting livestock operations in the area will be considered and determined according to customary use and best practices for good range management. Base properties will be classified as land or water and further in the following manner:

"Class 1. Land dependent by use, or full-time prior water.

"Class 2. Land dependent by location, or full-time water.

"161.6 (c) *Terms and conditions.* The issuance and continued effectiveness of all regular licenses and permits will be subject to the following conditions and requirements:

"(9) In the event of failure for any two consecutive years either to offer a base property in an application for a license or permit, or to accept a

license or permit offered pursuant to such an application, such base property will lose its dependency by use or priority."

EXPLANATORY STATEMENT

Petitioner owns 85,000 acres of grazing lands in Box Elder County, Utah, which comprise 62% of the lands within an area of a grazing district established by the Secretary of the Interior, under the Taylor Grazing Act. The government owns the remaining 56,000 acres or 38% of the land area involved, and the lands of petitioner and the government are of identical character and are so intermingled that no grazing use can be made of the lands of one without trespassing upon the lands of the other. (See the map in the appendix showing pattern of ownership between petitioner and the government.)

The case arises out of a contention, rejected by the government, that Sec. 3 of the Taylor Grazing Act requires that, within an area made up entirely of lands owned by petitioner and public domain, an award to petitioner be made of the right to graze the public domain which is so intermingled with his owned lands that it is physically impossible to graze his own lands without grazing the intermingled public domain.

The government, without making any arrangements with petitioner for use of his lands, awarded all use of these public lands to other livestock operators, who are totally unable to graze the area without grazing petitioner's lands, but who have been using these public lands under permits which the government has extended to them during the ten years the government leased from the former owner, the lands petitioner now owns. This position the government justifies on the theory that the Taylor Grazing Act authorizes the Secretary of the In-

terior to promulgate rules for the grazing use of the public domain, and that its rules, The Federal Range Code, portions of which are heretofore quoted, require that the demands of previous users of the range be fully satisfied before an adjacent land owner may be awarded any use of public forage.

The government placed these livestock of other owners in this range area, the public lands of which cannot be grazed without a like grazing use being made of petitioners' lands, and without securing any permission so to do from petitioner, the government itself managing the livestock covered by its permits. These livestock grazed yearlong the 85,000 acres which petitioner owns while they grazed the 56,000 acres of public domain. Thereafter the petitioner, after his application for award to him of a permit to graze the public domain was denied by the government, took less of his own livestock into the area than his own lands will adequately feed and, for this the government trespassed him and required him to pay a fine to the government for the incidental use he thus made of public domain. The government refused to allow petitioner to graze within the area with any number of livestock except upon the one basis that petitioner surrender to the government the complete control and management of his lands and livestock operations, the government fixing the numbers of livestock petitioner may graze so as to deny him any benefit of public domain forage, but requiring him to furnish all feed his livestock consume. For three months of the year involved in this action petitioner surrendered to the government 61,000 of the 85,000 acres he owns under the arrangement the government requird.

Petitioner then brought this action for money damages for the injury done him by the alleged wrongful acts of the government in; (1) denying petitioner any

use of public domain and; (2) in placing the livestock of other persons upon petitioner's lands without securing his consent. The decision below supports the position of the government that it is exempt from liability on the theory that the acts complained of fall within the discretionary function provision of the Federal Tort Claims Act (Sec. 2680(a).

STATEMENT

The Taylor Grazing Act authorized the Secretary of the Interior to withdraw a certain limited acreage of lands from the public domain, to include them within grazing districts, and to issue permits to graze livestock on these public lands. The Promontory Grazing District was thus established on April 8, 1935, extending across northern Utah, comprising a total of 4,714,000 acres of land, of which 1,186,806 acres are public domain (R. 1-2, 17, Ex. A, R. 391; Report of the Secretary of the Interior (1935), p. 18). Within the northwest portion of said grazing district the lands herein concerned are located (R. 2, 10, Ex. 1).

Petitioner has been a livestock operator for 27 years and within the exterior boundary of the lands herein concerned, he owns and controls 85,000 acres or 62% of the area, and the Government's public domain makes up the remaining 56,000 acres or 38% (R. 2, 4, 16) of these open, uncultivated range lands which have no value except as grazing lands (R. 3-4). The petitioner owns the odd numbered sections of land in each township bounding on all four sides the sections of public domain, and he leases certain of the even numbered sections, so that the sections of land owned by petitioner and the Government form an imperfect checkerboard pattern (Ex. 1, R. 4, 75, 76) which renders it physically

impossible for petitioner to graze his own lands without also grazing the adjacent and intermingled public domain, and making it likewise impossible for anyone to graze the public domain without also grazing petitioner's lands. (R. 4, 94).

Shortly after establishment of the grazing district and for the ten years down to the time petitioner acquired these lands in 1947 the Government had controlled them under an agreement with the former owner, Southern Pacific Land Company (Ex. 21-R. 365-371, R. 4, 164, Ex. 22-R. 371-380). Under this agreement permits for the use of the public domain within the checkerboard land area could be issued by the Government only to those persons who had first paid a lease fee or a grazing fee to the Southern Pacific Land Company for the grazing use of its lands which adjoined and were intermingled with the public domain, and the Government was required to issue to any lessee of these railroad lands a permit authorizing the lessee to graze without fee the public domain intermingled with his leased lands so long as the lessee grazed no more livestock than the forage produced upon his leased lands would adequately feed. (Ex. 21-R. 367).

After acquiring all of the lands, except the public domain, in this larger range area (R. 16, Ex. 1) petitioner duly submitted his application to the Government for issuance to himself of a grazing permit to allow him to graze, during the grazing season the Government had fixed, the public domain within the exterior boundary of his owned lands and to pay the required grazing fee for this grazing use of public lands (R. 80, 81, 85, 87, 99, Ex. 2-R. 334-336, Ex. A.-R. 388.). The Government rejected the petitioner's application and denied him any use of the public domain (R. 88, Ex. A- R389.) but con-

tinued to grant permits for the use of these public lands to the livestock operators to whom it had been granting them prior to petitioner's acquisition of these lands (R. 182, 292, Ex. 23- R. 380-382, Ex. 24- R. 382-383).

The government is without authority to assume the control and management of privately owned lands except under the Pierce Act (Ex. 22- R. 371-380) which provides for a direct lease of lands to the Government (see the Taylor Grazing Act), and under which Act petitioner, after he had been denied any right to the use of public domain which he could not avoid using if he grazed his own lands (R. 4, 94) offered to lease his 85,000 acres of land to the Government (R. 107, Ex. 17- R. 357-358). The Government's agents refused to consider any lease of petitioner's lands (Ex. 19- R. 361), denied him any use of public domain forage, (R. 88, 94, 194, Ex. A- R. 389), and offered him only one possibility whereby he might enter the area with any livestock, regardless of how few (R. 88, Ex. 12- R. 351, Ex. 8- R. 347). This single arrangement was for petitioner to surrender complete control over his lands and livestock operations to the Government and the Government would then continue to allow these other livestock operators to graze such kinds of livestock, in such numbers and for such periods of time and in such manner as it deemed advisable within the area without payment of any fee to petitioner (Ex. 7- R. 345-346, Ex. 12- R. 350-51, Ex. 14- R. 355).

Petitioner resisted surrender of his lands and livestock operations to the Government (R. 94, Ex. 19- R. 362) and entered the range area with less livestock than his own lands would adequately feed (R. 94) for which the Government's agents trespassed him (Ex. 18- R. 359) and required petitioner to pay a fine to the Government,

to remove his livestock from the area within five days, or to suffer impoundment and sale thereof (Ex. 18-R. 359, Ex. 20- R. 363-364). Said agents then refused to allow petitioner to enter the area with any livestock even under the single arrangement it had proposed until the fine the Government's agents had levied for this use of the range area was first paid (Ex. 19- R. 362). Petitioner paid the fine (Ex. 20- R. 363-64) and surrendered the control of 61,000 acres of his lands and his livestock operations to the Government for *that three month period only,* from December 29, 1948 to March 31, 1949 (Ex. 6- R. 343-344) and the Government then allowed him to graze in the area with livestock numbers as limited by it for said three-month period of time (Ex. 7- R. 345-346).

The Government thus secured and held control over a part of (61,000 acres) petitioner's lands for three of the 12 months concerned in this case, but had no control for any part of the year involved over the remaining 24,000 acres (Ex. 7-R. 345-346). The Government, nevertheless, granted permits to other livestock operators for the use of the public domain which they could not graze without grazing petitioner's intermingled lands for the entire 12-month period involved (R. 180, 292, Ex. 23- R. 380- 382, Ex. 24- R. 382-383. Ex. C- R. 407-409) and required that petitioner furnish 14 acres of range for each AUM of feed to be grazed by him from the area (Ex. B- R. 404) while it allowed only 4.03 acres of identical public domain to take care of each AUM of forage it permitted to these other livestock operators (computed by adding the AUMs permitted by the Government to these others as shown upon the above cited exhibits 23, 24 and Ex. C).

The permits to these other livestock were correctly *written* by the Government's agents to allow the live-

stock to graze the range area only during the proper grazing season as the Government has established them, but said agents failed to remove these livestock from the different units of range at the expiration of the time for which the permits were issued, and allowed the livestock to remain upon all areas of the range for the full year concerned in the case at bar, in season and out of season (R. 92, 93, 94, 104, 129, 130, 135, 179, 180, Ex. 25- R. 383-384, Ex. 19- R. 362), which amounted to a use of the range additional to that shown on the permits which the Government had issued to the extent of at least 1500 AUMs of forage, (R. 91, 93, 141, 142), and an AUM of forage had a value of $3.00 (R. 136).

REASONS FOR GRANTING THE WRIT

To the extent that the decision below has decided that the Government's range officials were exercising a discretionary function, as contemplated by Sec. 2680 (a) of the Federal Tort Claims Act, in denying petitioner any use of public domain forage and, in placing the livestock of others upon petitioner's lands by extending permits to those others for the use of this public domain which could not be grazed without grazing petitioner's lands, certiorari must be granted because the decision below is in conflict with applicable decisions of this Court: (*United States vs. United Verde Copper Co.*, 196 U. S. 207.) it is in conflict with decisions of other Circuit Courts of Appeal, and this important Federal question has not been but definitely should be settled by this Court.

To the extent that the decision below has decided that the Government's range officials were exercising a discretionary function, as contemplated by Sec. 2680 (a) of the Federal Tort Claims Act, in placing the livestock

of others upon petitioner's lands without his consent or permission, and then failing to remove those livestock after the close of the grazing season, certiorari must be granted because the decision below is in conflict with applicable decisions of the State of Utah and the decision below is in conflict with applicable decisions of other Circuit Courts of Appeal.

I

(a) THE COURT BELOW HAS DECIDED AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT AND, (b) IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

(a) THE COURT BELOW HAS DECIDED AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The precise questions presented here, involving an interpretation of the Taylor Grazing Act, have never been before this Court. It appears that the only case relating to the Taylor Grazing Act decided by this Court is that of Brooks vs. Dewar, 313 U. S. 354, 61S. Ct. 979. That case involved the question of the right of the Secretary of the Interior to collect grazing fees for the grazing of public domain under temporary licenses he issued to livestock operators.

The questions are of great importance to land owners in the ten western states, the greater part of the land area of many of which is public domain. The decision below supports the policy of the Government bureau that it is not the citizen livestock operator who, through his ownersip of lands and water, qualifies, under Sec. 3

of the Taylor Act, for the grazing use of public domain which he cannot avoid using if he is to graze his own lands, but that it is the Government which, by reason of its ownership and management of the public domain, is entitled to the control and use of the intermingled privately owned lands.

The problem is vitally important to western range and ranch land owners, and to their creditors. Unlimited endeavor and expense has been involved on the part of the citizens who, at the behest and with the encouragement of Government, appropriated the select parts of the western public lands with the unrestricted right to graze adjacent public domain. The decision below supports a policy imposed by the Government bureau that the cull parts of the public domain left in Government ownership after 150 years of selection are now to qualify the Government to take over the control and management of these privately owned lands, and to deny to the owners of these privately owned lands any further use of public domain which they must graze in making a grazing use of their own lands.

The decision below not only holds that the government is not liable for having denied petitioner any grazing use of public domain, which in effect denied him the right to graze his own intermingled lands which cannot be grazed without grazing the public domain, but the decision goes further and, while it supports the action of the Government in trespassing petitioner for having taken livestock into the area without having first secured the permission of the government, it holds that the government incurs no liability by aiding and directing the grazing of petitioner's lands, without first securing his consent so to do. The precise question here should be settled by this Court.

(b) THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

While the precise question presented here has not been settled by this Court, it is submitted that the decision below is most clearly inconsistent with closely analogous decisions of this Court involving rights to the use of timber upon public domain, and the extent to which the Secretary of the Interior may go in promulgating rules and regulations classifying persons who may qualify to cut and remove the timber.

Congress had enacted a statute permitting citizens and residents of certain named western states, including Arizona, to take timber from the public domain for "building, agriculture, mining and other domestic purposes," as the Taylor Act, in this case, permits certain citizens to take forage from public domain. The Act involved in the removal of timber also provided that the taking of the timber was to be subject to rules or regulations as the Secretary of the Interior may prescribe, as is likewise provided in the Taylor Act. The Secretary had prescribed a rule to the effect that no timber should be used under the provisions of the above statute for roasting or smelting ores because that was not a "mining operation." A mining company purchased great quantities of timber from a resident of Arizona who had cut the timber from the public domain, and the company used this timber in roasting copper ores. The government brought action to recover from the company the value of the timber on the theory that the timber had been taken for a purpose not permitted by the Secretary's regulations. The Court held that the Secretary had no authority to even misconstrue the statute and his act in so doing was void and wrongful. The Court further said:

> "But there is a more absolutely fatal objection to the regulations. The Secretary of the Interior attempts by it to give authoritative and final construction of the statute. This, we think, is beyond his power. If Rule 7 is valid the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term he can define another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. *The power of legislation was certainly not intended to be conferred upon the Secretary.*" (Italics Supplied) U. S. vs. United Verde Copper Co., Arizona, 196 U. S. 207. See also the case of U. S. vs. Richmond Mining Co., 40 Fed. 415, arising under the same statute as the Copper Company case involving the taking of timber from public lands in Nevada.

In the copper case above this Court said that the Secretary of the Interior was without discretion in determining who was to be permitted to remove the timber from these public lands. The Secretary was held bound to follow the plain, unambiguous language of the statute, and the intent of the Congress as clearly expressed in the statute was not to be watered down and effectually destroyed through regulations the Secretary promulgated in which he sought to define and limit the meaning of words contained in the statute, the meaning of which was already clear, and his attempt to evade the purpose of the statute amounted to an attempt to assume the power to legislate, a power which dwells solely in the Congress.

The right of petitioner to the public land forage in this case is so clearly set forth, and his circumstance is so completely within the meaning of the provision of Section 3 of the Taylor Grazing Act as to leave no possible discretion in the Secretary to promulgate a rule which eliminates the rights created by the statute. The

applicable provision granting to petitioner this preference is as follows: "(*Preference shall be given* in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business—*as may be necessary to permit the proper use of the lands,* water, or water rights *owned, occupied, or leased by them—*" (Italics Supplied). Here is a large landowner engaged in the livestock business in this state for nearly 30 years who *is physically unable to make any grazing use of his own lands* without grazing the public domain, and who is clearly entitled under the above cited provision of the Taylor Act to make such grazing use of public domain as is *necessary* in order to make a *"proper use"* of his owned lands. But the decision below denies petitioner any use of the public domain forage, grants all of it to persons unable to use it without trespassing upon petitioner's lands, and holds that the Secretary of the Interior may, in his discretion, refuse to apply the plain meaning and intent of a statute Congress has adopted to specifically govern the precise circumstance involved here. The direct and immediate result of the decision below is to almost totally destroy the value of petitioner's lands. It places the complete jurisdiction, control and management of petitioner's lands in the government. By controlling petitioner's lands the government has acquired a control of petitioner's livestock operations.

After allowing the free and uncontrolled use of the western public domain for nearly a century, during which strife and discord had arisen and grown between the land owners and others in the continually sharpening competition for the use of the forage resources of these lands, the Congress determined, for the benefit of stability and the protection of the lands, both public and private, to enact a statute to regulate the use of these public lands,

pending their final disposal. A study of the Taylor Grazing Act which Congress enacted to accomplish this purpose shows throughout its provisions a concern by the Congress for the protection of the owner of the privately owned lands which adjoin the public lands. Into this statute Congress has carefully written provisions to protect the homesteader, lessee, or owner of the privately owned ranch and range lands, and to grant to him a preference not only in securing permits and leases for the use of the forage of the public lands which adjoin his private holdings, but also a preference in acquiring the title to these lands as they are made available for acquisition. The Congress had every clear, affirmative intention to protect the use and value of the lands which it had, up to the time of the enactment of the Taylor Act, permitted to pass into private ownership, and which had such a direct relationship to the public domain as to require its use. In Section 3 the Congress provided for the preference in the use of the public domain forage under permits to go to the owner of lands and waters which required for their own proper use, the use of the public domain. Again, in Section 15 the preference in securing a lease upon public domain lands is given the adjacent land owner, for the grazing of the forage. And finally in Section 14 the adjacent land owner is given a preference to buy public lands offered for sale by the government. In each of these cited provisions of the Taylor Grazing Act the Congress used the word "*shall,*" mandatory in its meaning, in directing the Secretary that these land owners were to be given a preference in awarding the use and title of the public domain. Nevertheless, the government has taken the position, supported by the decision below, that the Secretary may award the permits for the grazing use of the public domain to whomsoever he determines, and that he may deny

persons clearly intended by the Taylor Act to have this grazing use of these public lands, and no recovery may be had against the government because these acts of the Secretary, in issuing or denying grazing permits, amounts to the exercise of a discretionary function, as contemplated by the Tort Claims Act, Sec. 2680 (a) and that the government is thus to escape liability for the acts of its agents. And the decision below would seem to grant the government this immunity from liability even though the acts be done, not merely in a negligent or careless manner, but even where done with willful and intentional design to injure or destroy the value of the land and livestock holdings of a citizen, under the theory that a governmental discretionary function is involved.

The Secretary of the Interior has authority to issue permits to and collect grazing fees from livestock owners for the use of public domain forage only by reason of the enactment of the Taylor Grazing Act. Theretofore there was no authority on the part of government to interfere with, allot, award or regulate the use of the forage resources of these public lands. The Secretary must look to the specific provisions of the governing statute in determining what things he may do and accomplish with these public lands. The provisions of that Act are definite and specific, and he may not disregard the plain and certain intent of the statute and then defend an action in tort by contending a discretionary function is involved. The Tort Claims Act provides that the government shall be liable in money damage where a private person could be held. It is true that this Act contains a provision that the government is not to be liable for acts done by its agents or officers which involve a discretionary function or duty. By this provision the Congress could have meant only to provide against the possibility that the Courts

might be led, under the waiver of tort immunity, to try to interfere with actions on the part of the sovereign which are, by their nature, purely governmental; such as actions providing for the common defense, intercourse with nations, the control of commerce between the states, etc. This provision cannot be interpreted to extend to a situation where, by the enacment of a statute, the government determines to enter a field of endeavor normally left to its citizens and then so conducts itself that it either negligently and wrongfully or intentionally injures the property of its citizens. If the government may escape liability in the case at bar no sovereign tort immunity has been waived under the Tort Claims Act.

The decision of the Court below does not support justice and would allow the government immunity from any action brought under the Federal Tort Claims Act upon the mere plea that it was exercising a discretionary function, even though it appears conclusively that it was not authorized to exercise discretion in the matter concerning which complaint is made. In considering this point this Court has said in *Feres v. U. S.* (1950 Term U. S. Supreme Court Advance Opinions, Vol. 95—No. 3 at page 136).

> "This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole. The Tort Claims Act was not an isolated and spontaneous flash of Congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit. As the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs—wrongs, which would have been ac-

> tionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government... Congress already had waived immunity and made the Government answerable for breaches of its contracts and certain other types of claims. At last, in connection with the reorganization Act, it waived immunity and transferred the burden of examining Tort Claims to the courts. The primary purpose of the Act was to extend a remedy to those who had been without."

Coming now to the remaining basis of the government's liability the agents and officers issued permits for several thousand head of both cattle and sheep to graze the area which could not be grazed without grazing petitioner's lands. The governments agents placed these livestock in the area, managed their grazing while they were upon the range, were in complete charge of the permitted livestock covered by the permits it issued. This Court has said that one who deliberately and intentionally and by affirmative acts avails himself of the pasturage on the uninclosed lands of another is liable therefor. *Lazarus vs. Phelps,* 152 *U. S.* 81; *Light vs. U. S.* 220 *U. S.* 523. Clearly there is liability here for the turn-in loose of this force, the thousands of head of livestock, upon petitioner's lands or upon the lands of the public where it was known and intended that the livestock would graze petitioner's lands. The decision below is that the government escapes liability under the theory that its actions in this regard also constitute the performance of a discretionary governmental function. The decision nullifies completely the purpose of the Tort Claims Act, and places the western ranch and range land owner completely at the mercy of government bureaus charged with management of public lands. If cattle and other livestock may be, by the government,

turned upon privately owned lands to consume, denude and destroy the forage thereon, then other government bureaus may direct waters or other forces to course over and through privately owned lands to their damage or destruction.

The actions of the Secretary in rejecting petitioner for any use of public lands and granting this forage to others who had to trespass upon petitioner's lands to graze the public forage directly reversed the meaning of the Taylor Act. Clearly the Taylor Act meant to provide that the use of public domain so located that privately owned land could not be grazed without grazing the public domain should go to the owner of these privately owned lands; and that plain intent may not be, as in this case, reversed so that the location of the public domain entitles the government to assume and exercise a control over the adjacent privately owned lands. While the Taylor Act may be properly interpreted to give to the Secretary authority to determine to whom the use is to be awarded of the public domain, which is not adjacent to privately owned lands, or the use of which is not required in order to provide a proper use of the privately owned lands, it specifically, in mandatory language, set forth that the use of public domain which is required by private land owners in order to make a proper use of their own lands, *shall* be awarded to such private land owners. The actions of the government, supported by the decision below, is to the effect that not only may the government, without incurring any liability, deny petitioner any public domain use, which makes it impossible for him to make any use of his own lands, but that it may then place other livestock in the range area in such numbers, and for such period of time as, in its discretion it determines, and without regard to any use of petitioner's lands and forage which results. The decision

below says at once that petitioner, who owns two-thirds of all land and forage in the area, is in trespass for entering the range area with any livestock without first securing the right so to do from the government, but that the government, which owns only about one-third of the land and forage, may make such use of the area without securing petitioner's consent, at its desires; and may then escape liability for use of petitioner's forage by claiming that it has the discretion whether it does or does not take private property.

II

THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF OTHER FEDERAL COURTS.

The Court below held that it was discretionary with the Secretary of the Interior to reject or to grant applications for the grazing use of the public domain. The decision below seems fairly interpreted to mean that no person may be heard to complain for having been denied a right to graze the public domain, even though the public domain has been included in a grazing district and the Secretary has determined to issue permits to graze the area.

In the case of Red Canyon Sheep Company v. Ickes (CA Dist. Col.) 98 F2d 308, the Court Refused to rule upon the question whether the Secretary of the Interior, in his discretion, might properly decline to establish a grazing district and bring public lands under the protection of the provisions of the Taylor Grazing Act, but with regard to the comparative rights of citizens to graze lands once brought within a district the court said:

> "But we do conclude that if the Secretary determines to set up a grazing district, including lands

upon which grazing has been going on then those who have been grazing their livestock upon these lands and who bring themselves within a preferred class set up by the statute and regulations, *are entitled as of right to permits as against others who do not possess the same facilities* for economic and beneficial use of the range." (Italics supplied)

The case at bar is one in which the Secretary has established a grazing district, and after the establishment of the district, has then determined to issue grazing permits for the use of the public domain concerned. The Secretary then issued permits to certain livestock operators to graze these public lands who own no lands within the area concerned and who cannot graze these public lands without grazing petitioner's intermingled lands. The Secretary issued these permits knowing that any grazing use of the area involves a grazing use of petitioner's lands, and these permits are issued for periods of time during which the Government has made no arrangements for the use of petitioner's lands. Petitioner, the only person who can graze the range area without grazing the lands of any other person is denied any use of the public domain.

The provision of the Taylor Act (Section 3) which it is contended extends a right to graze public domain to petitioner provides that "Preference *shall* be given" (Italics supplied.) In interpreting the word "authorized" as used in the same section 3 of the Taylor Act relating to the authority of the Secretary to issue grazing permits the court in the above Red Canyon sheep case held that the word "authorized" while permissive and diplomatic in form was mandatory in fact. The word *shall* as used in the provision as applied to the case at bar is far less permissive and diplomatic, and is clearly mandatory.

In the case of Oman v. U. S. (10th CA) 179 F2d 738 the plaintiff had been granted a permit for the exclusive use of public domain within a small sector of a grazing district, but the permits formerly issued to plaintiff's predecessors in interest were not cancelled by the Government. These predecessors continued to graze the range area after the permit for its exclusive use had been issued to plaintiff. Plaintiffs brought their action under the Federal Tort Claims Act, and the Court held that the Government agents were not exercising a discretionary function as contemplated by that Act in encouraging others to graze public domain land for the use of which plaintiff held a permit. The Red Canyon Sheep Company case and the Oman case, above cited, appear to be the only cases involving an interpretation of the Taylor Grazing Act which have been before Circuit Courts of Appeal in this country, and of these the Oman case alone involved the Federal Tort Claims Act. It is submitted that the decision of the Court below is in conflict with the decisions in each of these said cases. In the Oman case the Court below extended a protection to the rights represented by a permit issued by the Government, to graze public domain, but denied to privately owned lands that same protection in the case at bar.

The case of Ure v. U. S. (1950, DC Or.) 93 F. Supp. 779 was one brought under the Tort Claims Act to recover against the government for damages done plaintiffs lands by waters which broke through the banks of a canal constructed and operated by the government for the benefit of land owners, including plaintiff. The Court held that the operation by the government of an irrigation system was not the exercise of a discretionary function under the Tort Claims Act so as to preclude the

government from liability for damages caused by its operation of the canal.

Decisions of other Federal Court cases with which the decision of the Court below is in conflict on the question of the circumstances under which the government may escape liability under the discretionary function provision of the Tort Claims Act are found in the following cases:

Pumphrey v. Manor Real Estate & Trust Co. (1949, CA 4 Md.) 176 F2d. 414
Griggs v. U. S. (1949, CA 10 Colo.) 178 F 2d 1.
Dishman v. U. S. (1950 DC Md.) 93 F. Supp. 567.
Costley v. U. S. (1950, CA 5 Tex.) 181 F2d 723.
Hambleton v. U. S. (1949 DC, Wash.) 87 F. Supp, 994.

The decisions in the above cited cases leave little doubt that the government, in the case at bar, was left with no discretion but was under an absolute obligation to grant to petitioner the use of the public domain, and to refrain from granting to others the use of public domain which necessarily involved a trespass use of petitioner's lands, after it had gone so far as to have established the grazing district, and had then determined that the public domain was available for grazing and that permits for its use would be issued.

A doubt exists whether any real necessity existed for inserting in the Tort Claims Act the provision exempting the government from liability where the act complained of amounted to the exercise of a discretionary function. The whole purpose for inserting this provision could only have been to avoid the possibility that the courts might interfere with matters which are, of necessity, governmental in their nature and which exist apart from sovereign immunity. Answering the contention of the gov-

ernment that a discretionary function was involved in the case of Kendrick v. U. S. (ND Ala. 1949, 82 F. Supp. 779) the court said.

> "It may be argued that the exception with which we are concerned is unnecessary and that it was inserted only out of an abundance of caution as a storm signal to the courts lest they use the tool of construction to whittle away rights of a purely governmental nature, which exist apart from the concept of sovereign immunity and which congress did not intend to yield."

The government is liable here for having aided and encouraged these other livestock operators to take their cattle into the area, and for thereafter having managed those cattle upon the range, including petitioner's range, without having made any arrangements for the use of petitioner's lands. *Oman v. U. S.* (*CA*10, 1949, 179 *F*2*d* 738.) He who aids and encourages a trespass is as liable as though he had committed it himself.

III

THE DECISION BELOW IS IN CONFLICT WITH UTAH LAW

The decision below affirmed the action of the government in trespassing petitioner for having taken his livestock into the range area, less in numbers than his own lands would properly feed, but declares the acts on the part of the agents of the government, in placing livestock of others in this same range area without having secured the permission of petitioner so to do, is the exercise of a discretionary function as contemplated by Sec. 2680 (a) of the Tort Claims Act. Petitioner who owns about two-thirds of the area may not enter it with any livestock,

without first securing the right to use the other one-third of the area, but the owner of the one-third of the lands may place livestock of others in the area without regard to the wishes of the owner of the remaining two-thirds of the lands. Clearly the rule of the Court below does not operate the same way for each of the land owners involved in the case at bar and the decision below is without support.

In Utah one who lawfully grazes public lands can be held liable for damages in trespass for an incidental use of intermingled privately owned lands, even where the privately owned lands comprise less than one-tenth of the area and the public domain makes up more than nine-tenths of the area. *Winters v. Turner, Utah* 1929, 278 *Pac.* 816. The owner of cattle who wilfully turns them onto the land of another without his consent is liable. Jones v. Blythe, 33 Utah 362, 93 Pac. 994. This case involved land in the same county, Box Elder, and within the same checkerboard railroad land area as in the case at bar. See also Mower v. Olsen, 49 Utah 373, 164 P. 482, Hall v. Bartholomew, 51 Utah 279, 169 P. 943.

The Government here, placed these livestock of others in this area, without having made any arrangements with petitioner for use of his two-thirds of the area, and then assumed control of the area and activities therein by managing and controlling the livestock operations within the area, by fixing and determining the classes and numbers of each class of livestock which could graze the area, fixing seasons of use, and in all ways controlling the use of this entire range area, by extending permits to these others for the grazing of these public lands which the government's agents well knew could not be grazed without grazing petitioner's lands. All persons who advise, instigate, aid, encourage, or direct a

wrongful act are as liable as if they had performed the act themselves. *Roe v. Lundstrom,* 89 *U.* 520, 57 *P2d* 1128.

CONCLUSION

The Taylor Grazing Act authorized the Secretary to establish grazing districts, to include therein a limited acreage of the public domain, and to issue permits to livestock operators for the grazing use of the public domain included within established districts. Section 3 of the Taylor Act provides that, in issuing permits for the grazing use of the public domain a preference "shall be given" to the owners of the private land for the use of that particular part of the public domain the use of which is necessary to enable the land owner to make a "proper use of" his own land. In Section 15 of the Taylor Grazing Act provision is made for the lease of public domain, which is more easily handled in this way than through the issuance of grazing permits, and Section 14 provides that certain isolated tracts up to 1520 acres in a parcel may be sold by the government. In each of these sections, as in Section 3, we find the plain, unequivocal intention of the Congress expressed requiring that a preference, in the right to use or acquire the public domain, shall be granted to the adjacent land owner or the owner whose lands are so situated that their proper use requires the use of the public domain.

In the case at bar petitioner is unable to make any use of his lands without making a like use of the public domain which is so intermingled with his lands that he is physically unable to make any use of his own lands without grazing the public domain; and it is likewise impossible to graze the public domain without grazing petition-

er's lands. No parcel of the public domain in this approximately 141,000 acre area, 62% owned by petitioner, is larger than one section and each parcel of which is surrounded on all four sides by petitioner's lands.

The action of the Secretary in not only denying petitioner any use whatever of public domain, but in placing the livestock of others in the area, without having secured petitioner's consent to the use of his lands, amounted to a confiscation of private property. In order to secure any use even of the lands he owns the government required petitioner to surrender possession to it the lands he owns. No statutory authority exists for the government to acquire private property in this manner, but instead of granting to petitioner any protection for the lands he owns, the Secretary used the leverage of government power to take from petitioner the actual possession and benefits of ownership of his lands, thus extending in an unlawful way the authority over and control of western land resources exercised by government.

Whatever the Secretary of Interior might, in his discretion be able to do with the very great proportion of public domain not adjacent to, or intermingled with, private lands, is of no concern here. But as to the limited part of the public domain so intermingled with private lands that any use of the private lands requires a use of that particular part of the public domain the Secretary was totally without discretion except to grant it to the owner of the private land. Denying such a land owner any right to the use of public lands was an unlawful act, depriving the land owner of his property without due process.

The government's acts in placing livestock upon petitioner's lands without having secured his consent was an unlawful act for which a private person would have

been liable, and no discretionary function was involved here. The government is without discretion to take over and use the property of its citizens in this circumstance.

The decision of the Court below denies petitioner any recovery on the theory that the acts by the government officers were done in the exercise of a discretionary function as contemplated by Sec. 2680(a) of the Federal Tort Claims Act. Justice and equity and the rights of Petitioner arising through his ownership of this vast acreage of lands, and through the rights he has in the public domain by virtue of the provisions of the Taylor Grazing Act, requires review by this Court of the decision of the Court of Appeals for the Tenth Circuit.

For the reasons set forth above, it is respectfully requested that this petition for a writ of certiorari to the Court of Appeals, Tenth Circuit, be granted.

Respectfully submitted,

MILTON A. OMAN
Salt Lake City, Utah

MILTON V. BACKMAN
of Backman, Backman & Clark
Salt Lake City, Utah

SHIRLEY P. JONES
Salt Lake City, Utah
Attorneys for Petitioner